Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 19

GERMAN ALLIANCE INSURANCE COMPANY,
Petitioner,

vs.

HOME WATER SUPPLY COMPANY,
Respondent.

BRIEF FOR PETITIONER.

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No. 232.

German Alliance Insurance Company,
Petitioner,

vs.

Home Water Supply Company,
Respondent.

Brief for Petitioner.

STATEMENT.

The German Alliance Insurance Company, a corporation and citizen of New York, as subrogee to the rights of Spartan Mills, a corporation, seeks in this action to recover damages against Home Water Supply Company, a corporation and citizen of the State of South Carolina, for negligence and misfeasance in the furnishing of water for general fire purposes under a contract with the City of Spartanburg, S. C.

The action was brought in the Circuit Court for the District of South Carolina, the jurisdiction of which court was based on diverse citizenship.

The complaint (Transcript 2) alleges:

The ownership by Spartan Mills of the property destroyed, and its location in the City of Spartanburg; the issue to the owner, for valuable consid-

eration, by German Alliance Company of a policy of insurance against loss and damage by fire with respect to said property.

That during the life of the policy a fire had occurred which destroyed the greater part of the property insured, the loss being adjusted between the insurance company and Spartan Mills at the sum of $38,810, which sum, less 1% discount for a payment in advance of maturity, was paid to Spartan Mills by German Alliance Insurance Company. The fire is alleged to have occurred in March, 1907, and the loss to have been adjusted and paid in April of the same year.

That in February, 1900, the city council of Spartanburg had entered into a contract with Home Water Supply Company, whereby the latter undertook to furnish an adequate supply of water for fire protection with respect to the property of the residents of Spartanburg for a period of thirty-three years; that among other things it was in said contract provided that the water company should establish all mains necessary for the distribution of water throughout the city, being given the privilege of crossing the streets of the city for the purpose of laying such pipes, conduits or aqueducts as might be necessary for the proper distribution of water throughout the city, so as to effect the most adequate supply for domestic use and greatest protection against fire; that when mains were put in for city fire protection they were to be not less than six inches in diameter, unless permission were granted by the city council.

That it was further provided in said contract that the water company should constantly, night and day, except in the case of unavoidable accident, keep all the hydrants supplied with water for fire protection; that it should keep them in

good order and efficiency for such service and should always maintain a height of at least seventy feet of water in the standpipe or water-tower, except in the case of unavoidable accident, or when water should be drawn off for the cleaning of the same, or for any cause which could not be controlled by said water company.

That the contract further provided that the city might at any time require the water company to make extensions of its system of mains by giving sixty days' notice to said company, and might order hydrants placed on such extensions at the rate of not less than ten to the mile; and that the water company should install a patent electric apparatus for opening or shutting the valve or gate between the standpipe or water-tower and its system of mains, so that, in case of necessity, and should more pressure be required than that afforded by the water-tower, the engineer could pump directly into the mains, thereby giving any pressure required.

That in the years 1905 and 1906 the said Council of Spartanburg had, in accordance with the provisions of said contract, directed and ordered the water company to put in certain hydrants with connecting pipe, which order, if obeyed, would have carried fire protection to within about two hundred feet of the first of the buildings belonging to Spartan Mills that caught fire in March, 1907; that this order had been disregarded, and on the day of the fire the nearest hydrant to the building which first caught fire was about six hundred feet.

The complaint further alleged that the water company had disregarded its contract, in that it had failed to install the patent electrical apparatus for shutting off the water-tower and obtaining increased pressure by pumping directly into the

main; that it had further disregarded its contract by using four inch pipe instead of six inch pipe in the mains which supplied the fire hydrants contiguous to the property destroyed, and that furthermore, on the day of said fire, the pressure of water in the tower was far less than the contract called for. The complaint alleges, in conclusion, that as a direct consequence of the negligence in the performance of its contract in these several regards by the water company the fire department of the City of Spartanburg and the owner of the property were powerless to check the progress of the fire which had commenced through no fault of the owner; and that one house after another was destroyed in the conflagration which ensued from lack of water with which to extinguish the flames.

The resultant damage from the neglect and malfeasance of the water company is placed at the amount of loss by fire to the Spartan Mills, which the German Alliance Insurance Company was compelled to pay under its policy, and judgment was asked in that amount against the water company.

The defendant below demurred to the complaint upon the following grounds (Transcript 8):

(a) That the complaint does not state facts sufficient to constitute a cause of action.

(b) That the complaint fails to state a cause of action in favor of the plaintiff against the defendant.

(c) That no privity of contract is shown between plaintiff and defendant.

(d) Because the alleged failure of defendant to lay water mains would not give the plaintiff or Spartan Mills a right of action against the defendant.

(e) Because the tax-payer or its assignee would have no right of action against the defendant for failure to obey the said ordinance or for violation of or for failure to perform the contract made by the defendant with the City of Spartanburg.

The Circuit Court sustained this demurrer and ordered the complaint dismissed (Transcript 9). No opinion was handed down.

The case was then taken upon error to the United States Circuit Court of Appeals for the Fourth Circuit. The assignments of error (Transcript 10) set forth at some length the several grounds upon which the German Alliance Insurance Company claimed that the action of the Circuit Court in sustaining the demurrer and dismissing its complaint, was erroneous; but they may be summarized in the single proposition that the complaint as a matter of law stated a cause of action and therefore should not have been dismissed.

The Circuit Court of Appeals sustained the judgment of the court below in dismissing the complaint, holding in substance that no action would lie, either on contract or in tort, for damages sustained by inhabitants of a municipality against a private water company supplying water under a contract with a municipality (Opinion, Transcript 19, *et seq.*).

The case came into this court upon a petition for a writ of certiorari, and the writ was granted April 11th, 1910 (217 U. S., 602).

Specification of Error.

The complaint states a cause of action, and the sustaining of the demurrer and affirmance of judgment of dismissal was error.

Argument

The only question presented by the demurrer to the complaint is whether an action in tort will lie against a private water company whose negligence and wilful disregard of its duties in supplying water has been the proximate cause of loss of plaintiff's property.

The principal ground for the writ of certiorari urged by plaintiff in its petition, was that this court by its decision in *Guardian Trust Co.* vs. *Fisher* (200 U. S., 57) had sustained a right of action in tort against a water company through whose negligent performance of its duties private property had been destroyed; that that decision was binding upon the lower federal courts and that the affirmance of the judgment of the Circuit Court dismissing the complaint, was in effect a refusal on the part of the Court below to follow the law as laid down by this Court.

In *Guardian Trust Co.* vs. *Fisher*, the facts were these. A private water company under contract with the municipality to supply water for fire purposes, having constructed its plant, executed a mortgage upon its property to secure an issue of bonds. A subsequent mortgage was made which was afterwards foreclosed and the property sold to a new corporation, subject, however, to the lien of the first mortgage. Thereupon, the new corporation executed a further mortgage covering the same property, and thereafter, and while the plant was being operated by the second company, a fire occurred which destroyed certain property located within the municipal limits.

Fisher, the owner of this property, sued the second water company in the courts of North Carolina for damages, alleging negligence on the part of the company in its failure to supply water

to extinguish the fire. By special verdict the jury found the several issues of negligence, &c., in favor of the plaintiff.

Pending this action, the trustees under both mortgages brought foreclosure proceedings in the United States Circuit Court; the property of the water company was sold under a decree of that court and the proceeds paid into court for distribution.

Section 1255 of the North Carolina Code (1883) gives the judgment creditor whose judgment is based upon *tort*, a priority over bondholders secured by a mortgage upon the corporate property; and in order to avail himself of this statutory preference, Fisher insisted that the judgment entry in the state court should show on its face that the judgment was for *a tort*. The trial court refused to make an entry in this form, and the case was taken to the Supreme Court of the state, where the lower court was reversed, the cause remanded and, under instructions, the judgment was framed to recite that the recovery was "*for a tortious injury and damage done by the negligence of the defendant*" (*Fisher* vs. *Greensboro Water Supply Co.*, 128 N. C., 375).

To the action in the state court instituted by Fisher, neither the trustees under the mortgages covering the property of the defendant company, nor the bondholders, were parties, and the Supreme Court of North Carolina expressly refused to pass upon the question of plaintiff's right to a preference under Section 1255 of the North Carolina Code on the ground that the question was not before them.

Fisher then intervened in the proceedings in the Federal Court, set up his judgment and claimed a preference under the section of the North Carolina Code referred to. The Circuit Court allowed

his judgment lien priority over the claims of bondholder under both mortgages, and its decree was sustained by this court, to which the case was finally brought on certiorari (*Guardian Trust Co.* vs. *Fisher*, 200 U. S., 57).

The decision in *Guardian Trust Company* vs. *Fisher* was urged upon the court below, in the case at bar, by counsel for the petitioner. In holding that it was not bound by that decision, the court proceeded upon the theory that the only question before this court in *Guardian Trust Co.* vs. *Fisher*, was whether the judgment of the North Carolina Court was *in tort;* that this court did not have before it the question whether, upon the facts found by the jury, a tort was shown to have been committed. The court, therefore, apparently took the liberty to disregard the very comprehensive language of the opinion of Mr. Justice Brewer in which, after reciting the conclusion of the State Court, the learned Justice said, at page 67:

> "From the conclusion thus reached we are not inclined to dissent, and for these reasons. One may acquire by contract an opportunity for acts and conduct in which parties other than those with whom he contracts are interested, and for negligence in which he is liable in damages to such other parties. * * * Pollock, in his treatise, groups torts into three classes, in the last of which he specifies 'breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings' (Webb's Pollock on Torts, 7). This, it is said, implies the existence of some absolute duty not arising from personal contract with the other party to the action.
>
> "And here we are met with the contention that, independently of contract, there is no

duty on the part of the water company to furnish an adequate supply of water; that the city owes no such duty to the citizen, and that contracting with a company to supply water imposes upon the company no higher duty than the city itself owed, and confers upon the citizen no greater right against the company than it had against the city; that the matter is solely one of contract between the city and the company, for any breach of which the only right of action is one *ex contractu* on the part of the city. It is true that a company contracting with a city to construct water works and supply water may fail to commence performance. Its contractual obligations are then with the city only, which may recover damages, but merely for breach of contract. There would be no tort, no negligence, in the total failure on the part of the company. It may also be true that no citizen is a party to such a contract, and has no contractual or other right to recover for the failure of the company to act, but if the company proceeds under its contract, constructs and operates its plant, it enters upon a public calling. It occupies the streets of the city, acquires rights and privileges peculiar to itself. It invites the citizens, and if they avail themselves of its conveniences, and omit making other and personal arrangements for supply of water, then the company owes a duty to them in the discharge of its public calling, and a neglect by it in the discharge of the obligations imposed by its charter, or by contract with the city, may be regarded as a breach of absolute duty, and recovery may be had for such neglect. The action, however, is not one for breach of contract, but for negligence in the discharge of such duty to the public, and is an action for a tort. The fact that a wrongful act is a breach of a contract between

the wrongdoer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby' (*Osborne* v. *Morgan* [130 Massachusetts, 102, 104]; see also *Emmons* v. *Alford* [177 Massachusetts, 466, 470]). An individual may be under no obligation to do a particular thing, and his failure to act creates no liability, but if he voluntarily attempts to act and do the particular thing, he comes under an implied obligation in respect to the manner in which he does it. A surgeon, for instance, may be under no obligation in the absence of contract to assume the treatment of an injured person, but if he does undertake such treatment, he assumes likewise the duty of reasonable care in such treatment. The owner of a lot is not bound to build a house or store thereon, but if he does so, he comes under an implied obligation to use reasonable care in the work to prevent injury therefrom to others (*Holmes on the Common Law*, 278). Even if the water company was under no contract obligations to construct water works in the city or to supply the citizens with water, yet, having undertaken to do so, it comes under an implied obligation to use reasonable care, and if, through its negligence, injury results to an individual, it becomes liable to him for the damages resulting therefrom, and the action to recover is for a tort and not for breach of contract."

In the brief upon the petition for certiorari, we contended that the question, whether an action for tort would lie upon the facts shown, *was* before this court for decision in *Guardian Trust Co.* vs. *Fisher* and was necessarily decided in the affirmative in sustaining the priority of Fisher's lien; that the conclusion on the part of this court that the facts found by the jury in that case did not

in fact constitute a *tort*, as that word is understood in law, would have necessitated a reversal of the judgment of the lower court and a denial of priority to Fisher's lien over that of the bondholders.

These bondholders were neither parties nor privies in the state court, and were not bound by the conclusion reached by that court that the facts found by the jury constituted a tort. That question, so far as they were concerned, was left open for determination by the Federal Court, whose jurisdiction they had invoked.

In support of this position we cited *Brooks* v. *Ry. Co.*, 101 U. S., 443; *Hassell* vs. *Wilcox*, 130 U. S., 493.

In *Brooks* vs. *Ry. Co.*, 101 U. S., 443, a subcontractor, having filed his lien upon certain railroad property, sued thereon, making the railway company and the principal contractor parties, and, having obtained judgment, intervened in a foreclosure suit brought by the mortgagees. The mortgagees objected to the validity of the lien and to its being given priority, and it was urged that they were bound by the judgment of the State Court. This Court said (p. 445):

> "To those proceedings (the suits in the State court to enforce lien) Barnes, the principal contractor, and the railroad company were parties, and we take it for granted that as against them the judgments established the validity of the liens. The judgments do not bind the appellants (mortgagees), as they were not parties thereto. The validity of the liens as against them and, if valid, their precedence to that of the mortgage, are the questions for consideration here, and they must be determined by applying the statutes of Iowa to the facts of this case."

In *Hassall* vs. *Wilcox*, 130 U. S., 493, a Texas statute giving priority to the labor liens on rail-

roads, was to be construed and enforced. A creditor holding such liens obtained judgment in the State court, and afterwards intervened in a proceeding to foreclose, instituted in the federal courts by bondholders. The question of the validity and priority of the labor liens was referred to a master. The master held against the liens in part as containing charges for which no priority was given by statute. Upon exceptions the Circuit Court reversed this finding and gave judgment for the entire lien. The Supreme Court, in reversing the Circuit Court, and sustaining the findings of the master, held:

> "(1) That the bondholders were not bound by the judgment rendered in a suit to which they were not made parties.
>
> (2) As the claims of the creditor originated after the mortgage was made, he was bound to prove affirmatively, before the master the existence and priority of his lien.
>
> * * * (6) It was proper that the claim should be re-examined before a master."

Under the authority of these decisions, it was urged that as to the bondholders the decision in the Supreme Court of North Caroline in *Fisher* vs. *Greensboro Water Supply Co.* (128 N. C., 375) created no estoppel, and that therefore the question whether the facts relied upon by Fisher as a cause of action were such as satisfied the definition of the legal term "*tort*" as it is used in the statute so as to entitle him to a preference, was open for decision by the Federal courts.

If this contention be correct, it would follow that the conclusion reached both by the United States Circuit Court and by this Court, that the facts found by the jury in *Fisher* vs. *Greensboro*

Water Supply Co. were sufficient to sustain a judgment *for a tort*, was germane to the issues; and that the language quoted above was not mere *obiter dictum*, but involved the decision of a question which had to be decided by the federal courts in the affirmative in order to allow the judgment lien of Fisher a preference over the mortgage liens.

One other question presented upon the brief in support of the petition for the writ herein, was whether the federal courts were bound by any rule of decision to adopt the conclusion reached by the Supreme Court of North Carolina that a judgment based on the facts shown in *Fisher* vs. *Greensboro Water Supply Co.* was judgment "for a tortious injury and damage done * * * by the negligence of the defendant."

Section 1255 of the North Carolina Code (1883) reads as follows:

> "Mortgages of incorporated companies upon their property or earnings, whether in bond or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such corporations or execution for the satisfaction of any judgment obtained in the courts of this State for labor performed (nor for materials furnished such corporation) *nor for torts* committed by such incorporation, its agents or employees, whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This statute contains no enumeration of specific wrongs, judgment for which shall be entitled to priority. The Legislature makes use of the technical term "*torts*" in describing the causes of action which, when reduced to judgment, shall be given preference.

The previous cases in North Carolina allowing recoveries against private water companies under similar circumstances (*Gorrell* vs. *Greensboro Water Supply Co.*, 124 N. C., 328; *Jones* vs. *Durham Water Co.*, 135 N. C., 553) proceeded upon the theory of the right of the party aggrieved to recover in an action *upon the contract with the municipality*, holding that the contract had been entered into for the benefit of the inhabitants, and that therefore they were entitled to maintain an action thereon. There was therefore no "rule of property" in North Carolina arising out of numerous adjudications upon the construction of Section 1255, which federal courts would feel inclined to follow.

Moreover, in *Fisher* vs. *Greensboro Water Supply Co.*, the Supreme Court of North Carolina did not undertake to construe or apply Section 1255. As to Fisher's rights under that law, they refused to commit themselves, the bondholders not being before them, and that question not being raised by the record. They contented themselves by declaring that the facts found constituted a tortious injury, as that term is to be understood at common law.

But, as pointed out in the brief on the petition, even had they undertaken to construe the statute, this court would not have been bound by such construction in a case involving the rights of parties against whom there was no estoppel of record.

Section 34 of the Judiciary Act of 1789 has been repeatedly held by this court to be limited in its scope to State laws strictly local, dealing with rights and titles to things having a permanent locality, such as real estate titles and other matters immovable and intra territorial in their nature and character. The federal courts, in con-

struing State statutes, have uniformly declared their independence of State decisions, where the questions involved were matters of a general nature; or the terms to be defined those of general use in jurisprudence.

> *Swift* vs. *Tyson*, 16 Peters, 1;
> *B. & O. R. R.* vs. *Baugh*, 149 U. S., 368;
> *Venice* vs. *Murdock*, 92 U. S., 494, 501;
> *Pleasant Township* vs. *Aetna Life Ins. Co.*, 138 U. S., 67.

As was said in *Burgess* vs. *Seligman* (107 U. S., 20, 34):

> "The very object of giving to the national courts jurisdiction to administer the *laws of the States* in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views."

Granting that the bondholders, whose rights were involved in *Guardian Trust Co.* vs. *Fisher*, must be held to have purchased their bonds with knowledge of Section 1255 (N. C. Code), and of the priority over their claims given thereby to judgments were for torts, they were, under the authorities above cited, entitled to have a federal court, whose jurisdiction is properly invoked, define the term as used in the statute, and were not concluded by the definition of the word "tort," which might be adopted by a State court in an action in which they were neither parties nor privies.

Suppose, for example, the State court, in the action brought by Fisher against the water company, had entered a judgment *for a tort* upon facts showing clearly inevitable accident or an act

of God or some other proximate cause, injuries resulting from which have been uniformly held to be *damnum absque injuria*. This Court, in determining for the first time the rights of non-resident bondholders who have appealed to the federal jurisdiction, would surely not be bound by such a judgment.

The Circuit Court, in its consideration of *Guardian Trust Co.* vs. *Fisher* (115 Fed., 184, 189), clearly recognized its right, so far as the bondholders were concerned, to determine for itself whether a cause of action in tort formed the basis of Fisher's claim, and adopted the language of this Court from *Wisconsin* vs. *Pelican Ins. Co.*, 127 U. S., 265, as its own:

> "This judgment (*Fisher* vs. *Supply Co.*, 128 N. C., 375) is entitled to full faith and credit. As between the corporation and the plaintiff, it would be conclusive. It is presented in a cause in which mortgagees are parties; and the question is not whether the judgment be valid, but whether it is a judgment of such a character as it will be given priority to the claim of the mortgagees, who were not parties to the suit in which it was obtained. When such a judgment is presented to the court for affirmative action, while it cannot go behind the judgment for the purpose of examining into the validity of the claim, it is not precluded from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

In recognition of the same rule of decision, this Court, in considering the case, and being called upon to decide whether the judgment in the State court was for a tort, and therefore entitled to priority, apparently reached the very natural conclusion that the proper way to determine the ques-

tion was to see whether the facts on which the judgment was based constituted a tort. If they did not, there was no judgment *for a tort* which this Court would enforce against the bondholders, even though the North Carolina courts had decided as between other parties that those facts did constitute a tort. If they did, Fisher was entitled to his priority under the statute. The Court answered the question affirmatively, thereby, it would seem, committing the federal courts to the doctrine that a private water company, when it enters upon the performance of its contract with a municipality, incurs certain duties to the public, the breach of which, when attended by injury to private property, constitutes a tort, and that such injury is not *damnum absque injuria*.

Guardian Trust Co. vs. *Fisher* has been cited or its effect commented upon in three cases.

In *Mugge* vs. *Tampa Water Works Co.*, 42 So. Rep., 81, the Supreme Court of Florida, in considering the effect of that decision say (p. 85):

> "It is contended by the defendant in error that the only question before the United States courts in these cases was whether the judgments rendered in the North Carolina courts were in tort or on contract, and that the question of the right of the plaintiff to sue at all was not passed upon. But it seems to us that both of these courts passed on the question of the right of the plaintiff to sue in tort, and that they upheld that right, for, if the plaintiff did not have the right to sue in tort, then it follows that their judgments could not have been given priority over the mortgages. * * * Certainly there is nothing in the opinions of these courts that suggests a doubt of the correctness of the reasoning of the Supreme Court of North Carolina, but, on the

The same doctrine has received general recognition in the courts of this country. The liability of railroad companies, electric light and gas companies, and other and similar quasi-public corporations, for their negligence, irrespective of contract, is too well settled to require citation of authorities. Many other callings of a public nature have been held to be within the same rule of responsibility.

In *Robinson* vs. *Chamberlain*, 34 N. Y., 389, an individual for valuable consideration had covenanted to keep certain lock gates on the Erie Canal in repair. Through the negligence of the contractor in making repairs, one of the gates gave way while the plaintiff's boat was passing through, thereby causing damage. In an action in tort against the contractor by the injured individual, the court permitted a recovery, stating the rule to be that:

> "A public officer, or a contractor engaged to perform the duties of a public officer, is liable for negligence or malfeasance to any one sustaining special damage in consequence thereof."

In the concurring opinion of Smith, *J.*, he says (page 402):

> "By his contract with the State he (defendant) assumed a duty to the public. If he is not to be regarded as a public officer in all respects, it is at least true that certain public functions formerly discharged by public officers were *farmed out* to him by authority of law, and for a breach of duty in respect to the exercise of such functions, he is liable to any person injured thereby."

In *Fulton Fire Insurance Co.* vs. *Baldwin*, 37

N. Y., 648, the defendant had contracted to keep a section of the Erie Canal in repair and free from obstructions to navigation. A canal boat was sunk by a snag carelessly left in the channel and the cargo damaged. Plaintiff paid the loss under its policy and by right of subrogation brought suit against the contractor. The court in its opinion by Mason, *J.*, on page 650, says:

> "The defendant, under his contract with the State to keep this section of the Erie Canal in repair and free from obstructions, owed a duty to perform it; and which inured to the benefit of every citizen in the State who might have occasion to use this canal, and the defendant's neglect to remove this obstruction in disregard of the duty which he owed to all who might be concerned in the navigation of the canal, rendered him liable in this action."

In *Little* vs. *Banks*, 85 N. Y., 258, under a contract between Banks and the State of New York, the former agreed to publish and sell the State Reports upon certain terms. The contract provided, among other things, that Banks should keep on sale, furnish and deliver volumes of the reports, and that he should supply other booksellers at a fixed price and in certain quantities. The plaintiff, a bookseller, applied for a supply of the reports in accordance with the terms of this contract, and was refused. He thereupon brought his action for damages. The Court say through Miller, *J.*, page 263:

> "Contractors with the State, who assume, for a consideration received from the sovereign power, by covenant, express or implied, to do certain things, are liable, in case of neglect to perform such covenant, to a pri

in the city and the resulting loss to the city in the amount of taxes collected. The right to recover was denied upon the ground that the city's interest in the property destroyed was too remote and its damages merely consequential.

In *Bonaparte* vs. *Camden & Amboy R. R. Co.*, Baldwin C. C. [U. S.], 205, the test to be applied in determining whether an individual or a corporation has been guilty of a breach of public duty, is thus expressed, page 223:

> "The true criterion is whether the objects, uses and purposes of the incorporation are for public convenience or private emolument, and whether the public can participate in them by right, or only by permission."

This test was applied by the Supreme Court of Massachusetts in the case of *Kiernan* v. *Metropolitan Construction Co.* (170 Mass., 378). Plaintiff's house was on fire, and upon the sidewalk in front of it, was a fire hydrant connected with the fire service. The fire department of Chelsea came to put out the fire, and attempted to use the hydrant. It was covered in part or whole by a barrel filled with hay, placed over it by defendant. The Court say, page 379:

> "The hydrants were especially provided as a means of putting out fires, and the plaintiff had a right to have that hydrant used by the fire department to extinguish the fire in their house, if it chose to do so. While it is true, * * * that there was no obligation upon the city to extinguish the fire, it does not follow that the plaintiff was not deprived of anything to which she had a legal right if the defendant obstructed the firemen from getting water from the hydrant. She had a legal right to have the firemen get the water, if

> they chose to do so, from a supply provided especially for that purpose."

The position taken by some authorities that the duty cannot be considered independently of the contract because the contract by its terms defines the measure of duty, and that therefore the duty is not *public* in its nature, but one owing only to the other party to the contract—the city—cannot be sustained on principle. Although no court has squarely said so, we submit that the duty to furnish water for fire purposes having once been undertaken, the only question that can arise in an action for negligent performance of such duty is, whether the supply was reasonably adequate for the purpose for which it was intended. If a city, by its contract, has required of the water company a pressure so excessive as to be out of all reason, and the water company in a suit brought against it for negligence could show that while it had not literally complied with its contract it had maintained a reasonably adequate supply and pressure, we think there could be no recovery. On the other hand, we believe that liability cannot be evaded by a public servant by showing that his contract with the city called for no specified pressure or supply, or for a pressure or supply ridiculously inadequate. In other words, we submit the true rule to be that the contract in these cases is to be used just as speed ordinances are used in the "crossing" cases. They are evidence of what is *reasonable* and may be considered by juries in that light. Having entered upon a public calling, the water company owes a duty entirely independent of its contract and in no way bounded or measured by its terms.

In *Borough of Washington* vs. *Washington Water Co.*, 4 Robbins (N. J.), 254, a contract be-

tween a water company and a borough had expired. The water company and the borough authorities had entered into a heated controversy as to the prices to be paid for water to be furnished in future, and the water company threatened to turn the water off until some adjustment could be reached. The Court held that the water company, being a quasi-public company discharging duties to the public, had no right to cease rendering services to the public, although the contract under which those services had been rendered had expired, and although it had failed to reach an agreement with the city with regard to future payments for those services.

The same conclusion was reached where a gas company was concerned. (*Public Service Corporation* vs. *American Lighting Co.*, 1 Robbins, 122.)

II.

Does the immunity from suit enjoyed by a municipality which undertakes to furnish water for fire purposes inure to the benefit of a private water company with which it has contracted for such supply?

Some courts have held that in furnishing a supply of water for fire purposes, the water company is acting as a governmental agency—a delegate of the municipality; and since the city cannot be held liable for failure to supply water for such purposes even when it has undertaken to do so, neither can a water company be held liable.

Britton vs. *Green Bay, etc., Water W. Co.*, 81 Wis., 48;

Nichol vs. *Huntington W. Co.*, 53 W. Va., 348;

Akron Water Works Co. vs. *Brownless*, 10 Ohio C. C., 620.

The conclusion reached in these cases is due to a confusion of ideas which should have been kept quite distinct. When governmental functions are delegated to a municipality, the immunity of the sovereign from suits by its subjects accompanies their exercise by the municipality. The individual property owner is without a remedy against the city simply because the city in providing fire protection exercises the sovereign power of the state and hence cannot be sued. As the Court of Appeals of New York said in *Springfield Ins. Co.* vs. *Keeseville* (148 N. Y., 46), if "the defendant (the municipality) assume a governmental function," then it "comes under the sanction of the rule which exempts governments from suits by citizens."

But it is a *non sequitur* to say that because a municipality is not liable to individuals, a private water company which undertakes to perform the same acts is also not liable. When a municipal corporation does these acts it is a discretionary agent of the State, performing a function of sovereignty, and simply cannot be sued, while the water company does not represent the State and enjoys no such exemption.

> *People, ex rel., Mills W. W. Co.* vs. *Forrest*, 97 N. Y., 97.

To hold, as the cases cited above do hold, that the exemption of the municipality from suit by individuals is due the public and general character of the beneficiary, and that therefore the water company which serves the same purpose is also exempt, is to overlook the very basis of municipal non-liability. The question is not one of beneficiaries at all, but of a technical exemption from suit granted on grounds of public policy to cities

and other municipal corporations, but denied to private corporations.

III.

One objection which has been urged in permitting a recovery in these cases remains to be considered. It has been stated in several different ways.

Thus it has been urged that unless water companies are protected from the consequences of their own faults capitalists would not readily seek investment in enterprises involving such incalculable hazards, and the general public would lose the benefits now derived from them.

The same idea is expressed a little differently by the court below (Transcript, p. 27):

> "For the attainment of these municipal ends, the city has the right to pay out public funds, it may well be doubted whether it has the right to apply public funds to the larger compensation which the water company of necessity must charge for the enormous peril of having to pay for all private property lost by its negligence. Such expenditure of municipal funds raised by taxation of all property would be an unjust discrimination in favor of those whose property is exposed to fire loss, and against those whose property is not subject to that peril. There is at least a strong presumption against a municipality undertaking to pay for such indemnity from the public revenue."

These conclusions are based upon the admitted negligence of the water company. There is no question of unavoidable accident or act of God. The persons seeking redress do not seek to place the water companies in the attitude of insurers

against fire loss. The only question is, are they to be held responsible for their own negligence where that negligence has been the proximate cause of the loss.

A water company, in entering upon the discharge of its duties, presumably has the advantage of plans and calculations made by skilled engineers. It knows in advance what it will cost to furnish the water in the quantities required and at a proper pressure, and the price to be paid is presumably determined so as to allow for at least a reasonable profit. It is presumed also to have in mind the natural consequences of a failure on its part in the performance of its duty, and it requires no expert to tell it that water is needed to extinguish fires; that the citizens of the municipality as well as the municipality itself will rely upon the performance of its duty to furnish an adequate supply at a proper pressure; and that a continuous failure on its part to conform to its duty is bound at some time to cause a loss.

To permit a tort feasor to escape the result of his own acts or omissions merely because his disregard of the duties laid upon him by law has caused a loss to others, which, by reason of its magnitude it would ruin him to pay, is surely a strange doctrine.

If a private water company, in undertaking to furnish water to the inhabitants of a municipality for protection against fire, has entered into a public calling or has assumed certain duties with respect to the inhabitants that are public in their nature, there is no reason why it should escape liability caused by its negligent acts or omissions that would not apply with equal force to railroad companies, street car companies and other quasi-public corporations through whose negli-

gence individual members of the general public suffer injuries.

It is submitted that the judgment of the court below should be reversed and the cause remanded.

Respectfully,

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